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IN THE

Supreme Court of the United States

No. 75-78
October Term, 1975

FRANK J. SOUZA, MANUEL J. SOUZA, *et al.*,
Petitioners,

vs.

LOUIS ROMERO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MANNS, MANNS & LANDE,
LAWRIN S. LEWIN,
430 North Rodeo Drive, Suite 201,
Beverly Hills, Calif. 90210,
(213) 272-8631,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, Frank J. Souza, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals entered on February 19, 1975.

I.

Opinions Below.

The memorandum opinion of the Court of Appeals has not been published, but is set forth in Appendix "A". The order denying petition for rehearing is attached as Appendix "B".

II.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 19, 1975. A timely petition for rehearing was denied on April 18, 1975.

This is a seaman's suit under the Jones Act, 46 U.S.C. 688 and the general maritime law. This court's jurisdiction is invoked under the provisions of Article III, Section 2, of the U.S. Constitution, and under the Judicial Code, Sections 1331, 1333, and 1337.

III.

Questions Presented for Review.

A) Is the doctrine of unseaworthiness liability without fault, or does an unseaworthy condition of a vessel necessarily involve a faulty condition? If so, is it fault in the vessel's condition that creates unseaworthiness, and in turn imposes strict liability?

B) Was the Court below in error when it approved an instruction that stated in part:

> "Liability for an unseaworthy condition does not *in any way* depend upon negligence or *fault or blame*." (Emphasis added).

IV.

Statement of Case.

This is a personal injury suit by a commercial fisherman brought under the Jones Act, 46 U.S.C. 688, and the general maritime law alleging unseaworthiness of the vessel against his employers, who were the owners and operators of the fishing vessel, "SOUTHERN PACIFIC".

The accident allegedly happened at sea. Plaintiff claimed that he slipped and fell down a ship's ladder, injuring his knee. Negligence was charged as to the condition of the steps and that the vessel was unseaworthy because of their claimed slippery condition.

The court instructed the jury on unseaworthiness:

> "Under the maritime law every shipowner or operator owes to every member of the crew employed aboard the vessel the nondelegable duty to keep and maintain the ship, and all decks, and passageways, appliances, gears, tools and equipment of the vessel, in a seaworthy condition at all times.
>
> To be in a seaworthy condition means to be in a condition reasonably suitable and fit to be used for the purpose for which provided or intended.
>
> An unseaworthy condition may result from a ladder that is not reasonably fit for its intended purpose or purposes.
>
> *Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame.* That is to say, the shipowner or operator is liable for such injuries and consequent damages proximately caused by an unseaworthy condition existing at any time even though the owner or operator may have exercised due care under the circumstances, and may have had no notice or knowledge of the unseaworthy condition which proximately caused the injury or damage". (Italics added.)

The verdict was a general one and for the plaintiff in the sum of $170,106.00. It is impossible to determine that the verdict was not based on a finding of unseaworthiness. The correctness of the unseaworthiness instruction is critical in the case.

V.

Argument for Allowance of Writ.

A. Although Liability, Once an Unseaworthy Condition Exists, Is Absolute and Does Not Depend Upon Personal Fault or Blame or Negligence, Liability Does Depend Upon Precedent Fault in the Vessel's Condition. The Court Below by Reason of the Instruction Quoted Herein Created an Ambiguity by Failing to Adequately Distinguish Between the Condition Required to Create an Unseaworthy Vessel, and the Liability Imposed on Vessel Owners Once an Unseaworthy Condition Has Been Found to Exist.

The Court of Appeals for the Ninth Circuit, in its opinion, considered the question of fault only as to the shipowner's personal actions, that is, it held that his negligence is not required to impose liability for unseaworthiness. The court did not consider fault as it relates to the condition of the ship.

However, unseaworthiness relates to the condition of the ship. That condition need only be "reasonably fit". *Gutierrez v. Waterman S.S. Co.*, 373 U.S. 206, 213:

> ". . . the unseaworthiness doctrine, which is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used."

The only way that the ship can be unfit is for a *fault* to be present in the condition of the vessel. If it is a minor fault that still leaves the ship *reasonably* fit, there is no unseaworthiness. *Blier v. United States Lines Co.*, 286 F.2d 920; *Pinto v. States Marine Corporation of Delaware*, 296 F.2d 1.

By introducing into the maritime law the concept that neither fault nor blame is involved "in any way" in the

ultimate liability for unseaworthiness, the Court of Appeals for the Ninth Circuit has extended the liability for a shipowner beyond what has been defined by this court.

B. Petitioner Submits That This Court Has Held in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94, That the Liability for an Unseaworthy Condition Is Absolute, Once an Unseaworthy Condition Is Found to Exist.

However, this court has also held that the test for unseaworthiness is a *relative* one. Was the ship *reasonably* fit? *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539. To require that the vessel need be only reasonably fit necessarily recognizes that there is an area of risk and danger that is acceptable. Thus, there is a standard to judge or measure whether the condition on the ship, or of the ship and its equipment is faulty.

A fault in the vessel is a necessary element in the chain of fact and law that imposes liability on a shipowner for an unseaworthiness condition. Liability, therefore, necessarily depends upon first finding that the ship's condition was faulty.

C. Conflict in Decisions of Circuits.

The First, Third, and Fifth Circuits have considered whether fault was an element of unseaworthiness in deciding the applicability of certain statutes allowing recovery for wrongful death.

In *Skovgaard v. The M/V TUNGUS*, 252 F.2d 14, 17 (CA-3) aff. 358 U.S. 588, the court said:

> "It is urged that since unseaworthiness is spoken of as a species of liability without fault, it cannot be a 'wrongful act, neglect, or default' within the meaning of the statute. However, the characteri-

> zation of unseaworthiness as liability without fault is dangerously deceptive. For urgent and sound reasons of public policy, the law has imposed the absolute duty upon the shipowner to provide a seaworthy vessel, and liability results only as a consequence of that duty. If fault means negligence alone, of course, no fault is required, and to that extent only the phrase liability without fault is accurate. But to say that one who breaches a duty is without fault is a logical as well as legal incongruity."

The Fifth Circuit used the same reasoning in deciding *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1024-29.

The First Circuit in *Compania etc. v. Torres*, 358 F.2d 209, 213, held:

> "A longshoreman has a legal right to a seaworthy ship. If a person infringes upon this right and harm results by reason of the ship being unseaworthy, such person is at fault. . . ."

In a cause that did not involve a wrongful death statute, the Fifth Circuit held in *Morales v. City of Galveston*, 275 F.2d 191, 193:

> ". . . while it has been correctly said that liability for unseaworthiness is a species of liability without fault, the bare statement of the rule in this form, without adding after fault, in the sense of negligence, is apt to, as it has here, sometimes mislead some of the proponents of this view into believing, or at least claiming in effect, that, because of the absolute and non-delegable duty of unseaworthiness, the liability of a ship to indemnify a seaman, for an injury caused by the unseaworthiness of the vessel is that of an insurer to make and keep the ship safe under any and all circumstances."

VI.

Conclusion.

Petitioner submits that the question of law embodied in this petition is one of importance to the fair administration of the admiralty law, in that a definitive opinion of this court is needed to establish the doctrine that an unseaworthy condition of a vessel necessarily involves a faulty condition, and it is this fault in the vessel's condition that creates unseaworthiness, which in turn imposes strict liability.

The petitioners pray that a Writ of Certiorari be issued and that the judgment below be reversed and the case be remanded for a new trial.

Respectfully submitted,

MANNS, MANNS & LANDE,
LAWRIN S. LEWIN,
Attorneys for Petitioner.

APPENDIX A.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Louis Romero, Plaintiff-Appellee, v. Frank J. Souza, Manuel J. Souza, et al., Defendants-Appellants. No. 73-2150.

Filed: Feb. 19, 1975.

Appeal from the United States District Court for the Southern District of California.

Before: KOELSCH, HUFSTEDLER and VAN OOSTERHOUT,* Circuit Judges.

This is an appeal by defendants, the owners and operators of the commercial fishing vessel Southern Pacific, from judgment based on a jury verdict for $170,106.00 in favor of plaintiff Romero. Plaintiff, a member of the crew of the Southern Pacific, brought this action based upon the Jones Act and general maritime law for injuries sustained when he fell down a stairway and severely injured his knee. The action is based upon plaintiff's allegation that the vessel was unseaworthy and that the owners were negligent. Defendants' motion for a new trial was denied, the court stating the reasons for denial upon the record.

For reversal defendants assert ten errors which may be summarized as follows:

I. Errors in ruling on admission and exclusion of evidence.

II. Error in permitting plaintiff to call a second orthopedic witness.

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*Honorable Martin D. Van Oosterhout, Senior Circuit Judge. Eighth Circuit, sitting by designation.

III. Refusal to grant a continuance during the course of the trial.

IV. Errors in instructions given and refusal of requested instructions.

V. Excessiveness of the verdict.

We reject all of defendants' contentions and affirm for the reasons hereinafter set out.

I.

We are satisfied that the court committed no prejudicial error in its evidentiary rulings. Plaintiff advised the ship officers that he did not choose to go on the trip immediately following the injury, giving his reason as domestic difficulties. At the trial plaintiff testified that the excuse originally given was a lie and that his knee injury was the real reason why he did not make the trip. He testified that he did not give such reason for fear that it might hinder his chance for future employment. Defendants attempted to prove by plaintiff's wife and Mary Luz that plaintiff and his wife had in fact had marital difficulties. The trial court aptly pointed out that the marital difficulty issue was a collateral issue, exploration of which might lead to considerable evidence consuming an undue amount of time. We are satisfied that plaintiff's domestic relations had no direct bearing on the crucial disputed issue in this case of whether plaintiff's injuries occurred while he was at sea on defendants' ship. Defendants on the issue of plaintiff's credibility had the benefit of plaintiff's admission that the excuse given for not making the trip was a lie. The trial court has a wide discretion to exclude evidence on a collateral issue. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 230 (1940); *New Mexico Savings & Loan Ass'n v. United States*

Fidelity & Guaranty Co., 454 F.2d 328, 337 (10th Cir. 1972). *See* California Evidence Code § 352. No abuse of discretion has been established.

We have examined defendants' contentions with respect to other evidentiary rulings and are satisfied that the court committed no prejudicial error in its evidentiary rulings.

II.

The court did not abuse its discretion in permitting plaintiff to call a second orthopedic expert. Plaintiff had designated his expert as a witness sometime prior to the trial. The parties had exchanged medical reports. The decision as to the number of witnesses who may testify on a particular issue rests in the sound discretion of the trial court. *Loux v. United States*, 389 F.2d 911, 917, (9th Cir. 1968).

III.

The court did not abuse its discretion in denying defendants' motion for a continuance during the trial on Wednesday, November 29. The motion was based on the absence of Manuel Luz, at sea. Luz was expected back the following Sunday or Monday. He had already given a deposition which was received in evidence. The continuance motion was based upon plaintiff's surprise testimony that his report to Luz as to his reason for not wanting to go on the next voyage was a lie. As heretofore stated, there is no dispute that the plaintiff gave the marital difficulty excuse and did not assign his injury as a reason for not making the voyage. Moreover, Luz knew of the trial date before he departed on his voyage.

The trial court's denial of a motion for continuance can be upset only on a showing of abuse of discretion.

Davis v. United Fruit Co., 402 F.2d 328 (2d Cir. 1968). No abuse of discretion has been shown.

IV.

The defendants contend that the instruction given by the district court on unseaworthiness was erroneous for the reason that it imposed strict liability upon the defendants. The objected to instruction provides in pertinent part:

> "Under the maritime law every ship owner or operator owes to every member of the crew employed aboard the vessel the non-delegable duty to keep and maintain the ship, and all decks, and passageways, appliances, gears, tools, and equipment of the vessel, in seaworthy condition at all times.
>
> To be in seaworthy condition means to be in a condition reasonably suitable and fit to be used for the purpose for which provided or intended.
>
> An unseaworthy condition may result from a ladder that is not reasonably fit for its intended purpose or purposes.
>
> *Liability for unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the ship owner or operator is liable for such injuries and consequent damages proximately caused by an unseaworthy condition existing at any time even though the owner or operator may have exercised due care under the circumstances, and may have had no notice or knowledge of the unseaworthy condition which proximately caused the injury or damage.*" (Emphasis added).

Defendants concede, as they must, that the duty to furnish a seaworthy ship is absolute and non-delegable. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 94 (1946). They also concede that an unseaworthy ship may be created without negligence on the part of the owner. However, defendants argue that the emphasized portion of the instruction makes them liable even if they were entirely faultless or blameless. Defendants contend that an unseaworthy condition cannot exist without fault or blame on somebody's part.

In *Seas Shipping Co. v. Sieracki, supra,* the Supreme Court described unseaworthiness as "a species of liability without fault. . . . [n]either limited by conceptions of negligence nor contractual in character." 328 U.S. at 94. Indeed, the giving of an instruction which predicated liability for unseaworthiness upon a finding of fault has been held to be reversible error. *Ballwanz v. Isthmian Lines, Inc.,* 319 F.2d 457, 460-61 (4th Cir. 1963). *See Yanow v. Weyerhaeuser Steamship Co.,* 250 F.2d 74, 76 (9th Cir. 1958). In *Ballwanz* the court stated:

> "However true it may be as an abstract proposition of law that unseaworthiness in a broad general sense cannot exist without fault on someody's part in that it constitutes a breach of one's duty, it is not a fault in the ordinary everyday use of the term. Certainly no layman would accept as a 'fault' many of the conditions which the Court has held to constitute unseaworthiness. . . .
>
> . . . Thus the Court's emphasis upon the necessity of finding fault . . . was an unjustifiable dilution

of the doctrine of unseaworthiness as it has been developed by the Supreme Court." 319 F.2d at 460-61.

Moreover, the instructions when considered as a whole, which they must be, accurately describe the nature of a ship owner's duty to provide a seaworthy ship. The last sentence of the cited instruction correctly points out that an unseaworthy ship may occur even though the owner has taken due care and is unaware of the defect. Earlier in the instruction a "seaworthy condition" is defined as "a condition reasonably suitable and fit to be used for the purpose for which provided or intended." Taken as a whole the objected to instruction does not put upon the defendants the burden of an insurer for safety on board the ship.

This same instruction on unseaworthiness has been held not to create an imbalance between a ship owner's absolute duty to provide a seaworthy ship and his right not to be an insurer of safety on board the ship. *Provenza v. American Export Lines, Inc.*, 324 F.2d 660, 662-63 (4th Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).

The emphasized portion of the instruction given is part of the instruction suggested in 2 Devitt and Blackmar, Federal Jury Practice and Instructions, § 93.04, pp. 397-98 (2d Ed. 1970).

Defendants complain it was error to deny their proposed instruction No. 32 which provided:

> "You are instructed that the Defendants were not obliged to provide an accident-free ship; and that neither the Defendants nor the ship are insurers of the safety of the fisherman aboard her."

Such instruction is a correct statement of the law. *McCartney v. Compagnie Generale Transatlantique Corp.*, 253 F.2d 529, 533 (9th Cir. 1958). However, the court did instruct the jury that:

> "The defendants to not insure nor guarantee its employee against the possibility of accidents. They can be held liable only if you find that they failed to perform a duty imposed by law. . . ."

This instruction in substance is the same as the proposed instruction submitted by the defendants. To give the proposed instruction would have been repetitious and the failure to give it was not error. *See Tremblador v. Hamburg-American Lines,* 368 F.2d 365, 367 (9th Cir. 1966).

A careful consideration of the instructions as a whole satisfies us that the court fairly instructed the jury on the law of the case. The trial court committed no prejudicial error in overruling defendants' exceptions to instructions or in refusing to give defendants' requested instructions.

V.

On the excessive verdict issue, the trial court in ruling on the motion for a new trial analyzed the evidence and determined that there was substantial evidence to support the jury award. The court pointed out that the principal element of damage was future loss of earnings due to the permanent injury sustained and that the amount that could be recovered on this item, on the basis of the evidence, was within the amount actually awarded. The court further pointed out that plaintiff in addition had two serious surgical operations, that he had spent considerable time in hospitals, had worn numerous casts, had many physical therapy treatments,

and that by reason of his injuries he had suffered much pain and would likely suffer pain in the future, perhaps for the balance of his life. The court concluded its order denying a new trial as follows:

> "So I think, taken as a whole, the verdict, although it's a substantial one, as these things go, it was not excessive, it does not appear to have been engendered by passion or prejudice of the jury, and under all of the circumstances, I think it should be allowed to stand."

This court has stated the test for determining excessiveness of the verdict as follows:

> "The proper test is stated in our decision in Siebrand v. Gossnell, 9 Cir., 1956, 234 F.2d 81, 94:
>
> > "Absent a total want of evidence on all or certain portions of the case, or the erroneous exclusion from consideration by the trial court of appropriate matters or a showing of bias or prejudice on the part of the jury, this court may not reverse the trial court unless the verdict can be said to be grossly excessive or monstrous * * * " *Barzelis v. Kulikowski*, 418 F.2d 869, 870 (9th Cir. 1969)

See also Southern Pacific Co. v. Zehnle, 163 F.2d 453, 455 (9th Cir. 1947).

Judged by the foregoing standards, defendants have failed to demonstrate that the verdict was excessive.

Affirmed.

APPENDIX B.

Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing In Banc.

United States Court of Appeals, for the Ninth Circuit.

Louis Romero, Plaintiff-Appellee, vs. Frank J. Souza, Manuel J. Souza, et al., Defendants-Appellants. No. 73-2150.

Before: VAN OOSTERHOUT,* KOELSCH and HUFSTEDLER, Circuit Judges.

The panel, as constituted in the above case, voted to deny the petition for a panel rehearing and to recommend rejection of the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

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*The Honorable Martin D. Van Oosterhout, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.